

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On March 10, 2009 appellant, then a 30-year-old former customs and border protection officer, filed an occupational disease claim (Form CA-2) alleging that he injured his back after falling from a chair in the performance of duty on November 9, 2006. He also indicated that his job required sitting which caused back and leg pain. Appellant filed a traumatic injury claim (Form CA-1) for the same November 9, 2006 fall. OWCP accepted a lumbar sprain and aggravation of degenerative disc disease (OWCP File No. xxxxxx968).²

By letter dated September 12, 2007, appellant was terminated from his employment on the grounds that he was absent from duty for considerable periods of time during his two-year internship and was unable to perform his full range of duties. The employing establishment noted that appellant sustained an injury on November 9, 2006.

By letters dated May 4, 2009, OWCP requested additional information from appellant and the employer regarding appellant's claim which allegedly occurred prior to his termination.

In an August 27, 2007 medical report, Dr. Bryon W. Thomas, a Board-certified family practitioner, diagnosed low back pain with right lower extremity radiculopathy and hyperlipidemia. He wrote appellant a work excuse letter for April 25, 2007.

In a narrative statement received by OWCP on May 22, 2009, appellant reported that he sustained an injury while working for a nonfederal employer in July 1996, was diagnosed with a herniated disc and returned to work after a year and a half of physical therapy and epidural blocks. On April 2, 2004 he injured the same disc when working for the Transportation Security Administration (TSA). In a narrative statement dated May 16, 2009, appellant noted that he sustained another back injury while working for TSA on October 26, 2005. He alleged that his current back condition was caused by sitting for a minimum of eight hours a day.

In a series of medical reports, Dr. Thomas provided appellant work excuse letters for the period April 25 to October 12, 2007 due to low back pain.

In a May 14, 2007 medical report, Dr. Jamie E. Gottlieb, a Board-certified orthopedic surgeon, diagnosed degenerative disc disease at L4-5, herniated nucleus pulposus and stenosis. Dr. Gottlieb opined that appellant's back condition was an exacerbation of a preexisting condition and advised appellant to return to light-duty work with the following restrictions: no bending or twisting, mostly sedentary work, being allowed to change positions every 30 to 45 minutes and no lifting more than 15 pounds.

By decision dated July 13, 2009, OWCP accepted appellant's claim for intervertebral disc disorder with myelopathy of the right lumbar region.

² By decision dated December 4, 2008, the Board found that appellant failed to establish a recurrence of total disability during the period April 29 through June 18, 2007 causally related to his accepted November 9, 2006 employment-related injuries. (Docket No. 08-1557).

On August 14, 2009 appellant filed a claim for wage-loss compensation (Form CA-7) for the period commencing April 25, 2007.

By letter dated August 31, 2009, OWCP notified appellant that his claim for compensation was incomplete and requested additional evidence.³ It allotted 30 days for him to respond to its inquiries.

In an October 6, 2009 medical report, Dr. Thomas advised that appellant attempted to return to work on May 7, 2007 but was unable to work due to his utility belt.

By decision dated March 3, 2010, OWCP denied appellant's claim for compensation benefits beginning April 25, 2007. It noted that the evidence submitted failed to establish how sitting at work caused or aggravated his disability for the period claimed. OWCP found that appellant failed to afford the employing establishment with an opportunity to provide him with limited-duty work as it was his responsibility to provide a copy of his restrictions once appellant was released to light-duty work by Dr. Gottlieb on May 14, 2007.

Appellant requested an oral hearing which was held on June 15, 2010. He testified that he faxed his medical restrictions from Dr. Gottlieb to the employing establishment. The employing establishment offered appellant two positions: his previous position without the requirement of wearing the approximately 15-pound utility belt or collecting customs declaration forms which would require standing and leaning over a platform. Appellant testified that he was able to perform his work duties while standing or allowed to move from a seated position every 45 minutes. He acknowledged that Dr. Gottlieb effectively released him to his regular job.

Appellant submitted a November 21, 2007 medical report by Dr. Thomas who indicated that appellant was unable to perform his required duties from April 29 to June 18, 2007 until he was able to receive physical therapy and epidural injections.

By decision dated August 12, 2010, OWCP's hearing representative denied appellant's claim for wage-loss compensation finding that he did not submit sufficient medical evidence to establish that he was disabled for work on and after April 25, 2007 due to an employment-related low back condition.

LEGAL PRECEDENT

Section 8102(a) of FECA⁴ sets forth the basis upon which an employee is eligible for compensation benefits. That section provides: "The United States shall pay compensation as specified by this subchapter for the disability or death of an employee resulting from personal injury sustained while in the performance of his duty...." In general the term "disability" under FECA means "incapacity, because of an employment injury, to earn the wages the employee was

³ OWCP noted that appellant previously submitted claims for compensation for the same time period which it reviewed, developed and denied by decisions dated August 27, 2007 and March 26, 2008.

⁴ 5 U.S.C. § 8102(a).

receiving at the time of injury.”⁵ This meaning, for brevity, is expressed as disability for work.⁶ Appellant, for each period of disability claimed, has the burden of proving by a preponderance of the reliable, probative and substantial evidence that she is disabled for work as a result of her employment injury. Whether a particular injury caused an employee to be disabled for employment and the duration of that disability are medical issues which must be proved by the preponderance of the reliable probative and substantial medical evidence.⁷

Disability is not synonymous with physical impairment, which may or may not result in an incapacity to earn wages. An employee who has a physical impairment causally related to his or her federal employment, but who nonetheless has the capacity to earn the wages he or she was receiving at the time of injury, has no disability as that term is used under FECA and is not entitled to compensation for loss of wage-earning capacity. When, however, the medical evidence establishes that the residuals of an employment injury are such that, from a medical standpoint, they prevent the employee from continuing in his or her employment, the employee is entitled to compensation for any loss of wage-earning capacity resulting from the employment injury.⁸ The Board will not require OWCP to pay compensation for disability in the absence of any medical evidence directly addressing the particular period of disability for which compensation is claimed. To do so would essentially allow employees to self-certify their disability and entitlement to compensation.⁹

ANALYSIS

The Board finds appellant is not entitled to wage-loss compensation on or after April 25, 2007. The Board finds that he did not submit sufficient rationalized medical evidence explaining how his work activities materially worsened or aggravated his low back condition and caused him to be totally disabled for work as of April 25, 2007.

In a May 14, 2007 medical report, Dr. Gottlieb advised appellant to return to light-duty work with medical restrictions. At the June 15, 2010 oral hearing, appellant testified that he was able to perform his work duties in compliance with Dr. Gottlieb’s medical restrictions by standing and moving from his seated position every 45 minutes. Dr. Thomas provided appellant work excuse letters for the period April 25 to October 12, 2007. In a November 21, 2007 medical report, he reiterated that appellant was unable to perform his required duties from April 29 to June 18, 2007 pending physical therapy and epidural injections. In an October 6, 2009 medical report, Dr. Thomas indicated that appellant attempted to return to work on May 7, 2007 but was unable to work due to his utility belt. The medical reports of Drs. Gottlieb and Thomas do not provide any rationalized medical explanation as to how the residuals of

⁵ *William H. Kong*, 53 ECAB 394 (2002); *Donald Johnson*, 44 ECAB 540, 548 (1993); *John W. Normand*, 39 ECAB 1378 (1988); *Gene Collins*, 35 ECAB 544 (1984); 20 C.F.R. § 10.5(f).

⁶ *Roberta L. Kaaumoana*, 54 ECAB 150 (2002).

⁷ *Fereidoon Kharabi*, 52 ECAB 291, 292 (2001).

⁸ *Merle J. Marceau*, 53 ECAB 197 (2001).

⁹ *Fereidoon Kharabi*, *supra* note 7.

appellant's November 9, 2006 employment injury caused disability or otherwise prevented appellant from continuing in his employment. Appellant has not met his burden of proof to establish that he is entitled to compensation for any loss of wage-earning capacity.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish that he is entitled to compensation benefits for the period April 29 to June 18, 2007.

ORDER

IT IS HEREBY ORDERED THAT the August 12, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 21, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board